No. 77-318

In the Supreme Court of the United States

OCTOBER TERM, 1977

CARMEN SHANG, PETITIONER

v.

GAYLE MCQUOID HOLLEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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This memorandum is submitted in response to the Court's invitation of October 17, 1977. The views expressed here have been formulated after consultation with the Department of Health, Education, and Welfare, whose program is directly involved, with the Departments of Labor and Agriculture, which now, or in the recent past, have administered programs governed by identical guidelines in respect of the inclusion of aliens, and with the Immigration and Naturalization Service.

1. The underlying facts are, for the most part, unchallenged. Although it is not altogether clear whether Mrs. Holley (as she now is) first entered the United States

in 1954 or 1958, or when she last re-entered,[1] there is no dispute that she has been within the country, with some absences, since some date in the 1950s and has continuously remained since at least 1969. It is also common ground that Mrs. Holley has six minor dependent children, all United States citizens, the youngest of whom was only one year old when these proceedings began in 1976. According to the Immigration and Naturalization Service, she is, strictly speaking, "illegally in the United States," but it has been determined that, for humanitarian reasons, no deportation proceedings or other measures to enforce Mrs. Holley's departure will be undertaken so long as her children remain dependent upon her.[2] Moreover, it is not settled what action might be taken when the children cease to be dependent. If she is not then herself receiving public assistance—which now debars her—she might be eligible for permanent resident status.

Apparently, Mrs. Holley has been receiving payments under the Aid for Dependent Children program in the State of New York since 1968. The entitlement of her children has never been questioned, but, in 1974, the State and County Social Services Commissioners challenged her own claim under New York regulatory provisions that deny eligibility to "an alien who is unlawfully residing in

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[1]According to her own complaint (Pet. 5), Mrs. Holley has been residing in the United States since 1954. The court of appeals accepted that representation, adding that she had absented herself since then only for three months in 1958 (Pet. App. A6). However, the INS Director's letter (Pet. App. A21) states that Mrs. Holley first entered the country in 1958, and last re-entered in 1969.

[2]Such action is authorized by Section 237(a) of the Immigration and Naturalization Act, 66 Stat. 201, 8 U.S.C. 1227(a), as implemented by regulation. See 8 C.F.R. 237.1

the United States." The payments to Mrs. Holley on account of the family unit were accordingly reduced, and after an unsuccessful administrative appeal, she filed a complaint in the district court. The suit was initially dismissed for lack of jurisdiction, and, on remand from the court of appeals, summary judgment was entered against Mrs. Holley. On the present appeal, the judgment was reversed, the court of appeals ruling that, under the governing federal regulation (45 C.F.R. 233.50), Mrs. Holley qualified as "an alien * * * permanently residing in the United States under color of law."[3]

2. The only question presented in the petition for certiorari is whether the words just quoted embrace Mrs. Holley's case. It is not suggested—nor could it be (see *King* v. *Smith,* 392 U.S. 309, 333, n. 34; *Burns* v. *Alcala,* 420 U.S. 575, 580)—that the federal regulation does not override any conflicting state rule. And it is common ground that the formula for alien eligibility under the AFDC program is identical to that chosen by Congress for comparable programs, the Supplemental Security Income for the Aged, Blind and Disabled (SSI), also administered by HEW,[4] and the federal-state unemployment compensation program partially paid for by the

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[3]The full text of the regulation, 45 C.F.R. 233.50, is as follows:

> Conditions for plan approval. A State plan under title I, IV-A, X, XIV, or XVI of the Social Security Act shall include an otherwise eligible individual who is resident of the United States but only if he is either (a) a citizen or (b) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) or section 212(d)(5) of the Immigration and Nationality Act).

[4]42 U.S.C. (Supp. V) 1382c(a)(1)(B).

Department of Labor.[5] The same test is incorporated in regulations for HEW's Medicaid program,[6] and was in the Agriculture Department's Food Stamp program[7] until the recent enactment of restrictive provisions.[8] As petitioner rightly suggests, the same words presumptively carry the same meaning in these several statutes and regulations.

The three federal Departments concerned with the identical test for alien eligibility are agreed that Mrs. Holley is an alien permanently residing in the United States under color of law. This consistent interpretation of a provision by those charged with the administration of the several programs is not without significance. See *Udall* v. *Tallman*, 380 U.S. 1, 16; *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381. But in any event, the decision of the court of appeals is, we submit, plainly correct.

3. There is little occasion to add to the analysis undertaken by the court of appeals. In our view, it is perfectly clear that the phrase "residing * * * *under color of law*" includes, at least, residence continued by virtue of official permission or acquiescence. And, here, there is no question about the Immigration Service's express decision to allow Mrs. Holley to remain in the country. The only possible argument is that she is not residing in the United States "*permanently*."

We believe the court of appeals correctly resolved that question (Pet. App. A14-A15) by noting that the regulation gives illustrative examples of an alien who, although not "admitted for permanent residence," is

[5]Pub. L. 94-566, Section 314(a), 90 Stat. 2680, to be codified at 26 U.S.C. 3304(a)(14)(A).

[6]45 C.F.R. 248.50.

[7]7 C.F.R. 271.1(e).

[8]See Pub. L. 95-113, Section 6(f), 91 Stat. 966, to be codified at 7 U.S.C. 2015(f).

"otherwise * * * *permanently* residing in the United States under color of law." These "permanent" residents include the beneficiaries of the "conditional entry" provision for refugees[9]—which may be revoked at any time[10]—and the beneficiaries of the "parole" provision, even though "parole," by definition, only permits presence within the country "temporarily."[11] The two examples—and they are no more than that—obviously forbid any narrow reading of "permanently."

What is more, these illustrative examples of conditional entry and parole—like the formula itself—are directly borrowed from the *congressional* language fixing the eligibility of aliens under the related SSI program[12] and have since been confirmed by the Congress in amendments to the federal-state unemployment compensation law.[13]

When we come to apply to the present case the test of "permanence," as illumined by the examples, the result is not in doubt. Although the decision to allow Mrs. Holley to remain in the country is not irrevocable, it would seem less temporary than in the case of a parolee. In all probability, the youngest of her children will remain dependent upon her for well over a decade. Moreover, it may be that when that dependency ceases, or before, Mrs. Holley will no longer be receiving public assistance and will become eligible for permanent residence status.

[9]8 U.S.C. 1153(a)(7).

[10]See 8 C.F.R. 235.9(f).

[11]8 U.S.C. 1182(d)(5). And see 8 C.F.R. 212.5.

[12]42 U.S.C. (Supp. V) 1382c(a)(1)(B).

[13]26 U.S.C. 3304(a)(14)(A), as amended in 1977.

4. In the circumstances, we believe the decision below does not warrant review by this Court. There is, admittedly, no conflicting ruling. Nor does the decision affect a broad category of aliens. We are advised by the Immigration Service that administrative discretion not to deport is very sparingly exercised. And the number of programs governed by the alien eligibility rule involved here is diminishing. As we have already noted, Congress has recently narrowed the category of aliens eligible under the Food Stamp program.[14] Moreover, proposals by the President to amend Section 249 of the Immigration and Nationality Act, as amended, 8 U.S.C. 1259,[15] will, if enacted, make the present eligibility formula obsolete. The continuing importance of the issue is accordingly doubtful.

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MARCH 1978.

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[14]See note 8, *supra*.

[15]See Senate Bill 2252, 123 Cong. Rec. S18064 (daily ed. October 28, 1977).